In the Supreme Court of the United States

October Term, 1976
No. 76-1042

BETHLEHEM STEEL CORPORATION,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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COUNTER-STATEMENT OF THE CASE

This matter comes before this Court following an appeal by Bethlehem Steel Corporation ("Bethlehem") to the Pennsylvania Supreme Court from the dismissal of preliminary objections filed by Bethlehem to a petition for enforcement of administrative order filed by the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER") in the original jurisdiction of the Pennsylvania Commonwealth Court. DER petitioned for enforcement of Air Pollution Abatement Order No. 72-533 ("order") which imposes certain duties and schedules upon Bethlehem with respect to the control of emissions from by-product coke oven batteries at its Bethlehem (PA) and Johnstown plants. In its preliminary objections, Bethlehem challenged the jurisdiction of the Commonwealth Court under state law. The Commonwealth Court dismissed its objections, and Bethlehem appealed to the Pennsylvania Supreme Court pursuant to the Act of March 5, 1925, P.L. 23, §1, 12 P.S. §672, which creates a statutory exception to the rule prohibiting appeals from interlocutory orders by authorizing appeals from preliminary determinations of jurisdiction by a court of first instance. The Pennsylvania Supreme Court affirmed the Commonwealth Court and remanded for proceedings on the merits.

The entire litigation to date has been based on two pleadings: DER's petition and Bethlehem's preliminary objections. A true and correct copy of Bethlehem's preliminary objections is attached hereto and marked Appen-

dix A. Nowhere in Bethlehem's objections was any federal constitutional provision cited, asserted as a ground for objection, or in any manner alluded to. Nor did Bethlehem ever cite, or allude to any federal constitutional provision as support for its objections in its briefs or during argument to either the Commonwealth Court or the Pennsylvania Supreme Court.

DER replied noting that each of Bethlehem's preliminary objections rely upon the pendency before the Environmental Hearing Board of appeals filed from DER's denial of Bethlehem's respective applications to modify the air pollution abatement plans previously approved by DER pursuant to Order No. 72-533. In response, DER asserted as a matter of law that:

1. The mere filing of a petition to amend a final order of DER, to wit, an order from which no timely appeal has been taken or which has been sustained on appeal, does not constitute an amendment of any such final order; and

2. Taking an appeal from DER's denial of a petition to amend a final agency order does not constitute an amendment of such an order, nor does it constitute a supersedeas from such an order; and

3. The pendency of Bethlehem's appeals does not relieve Bethlehem of the obligation to comply with the duties presently imposed by Order No. 72-533 until such time as the obligations incorporated in said order are amended pursuant to such remedies as may be available to Bethlehem according to law; and

4. The pendency of said appeals does not in any manner act to modify, suspend or supersede Order No. 72-533, and does not deprive the Commonwealth Court of jurisdiction under Section 10(a) of the Air Pollution Control Act to enforce the present obligations of Order No. 72-533 as an "order issued pursuant to this Act by the department from which no timely appeal has been taken or which has been sustained on appeal" (Section 10(a), A.P.C. Act).

DER does not believe that Bethlehem's recitation of the factual history of the case in its petition for writ of certiorari is accurate or complete. Therefore, a counter-statement of the history of the negotiation between DER and Bethlehem regarding control of coke oven battery emissions at the Bethlehem (PA) and Johnstown plants is presented for the convenience of the Court.

A. Order No. 72-533 was executed by mutual agreement by Governor Shapp, DER Secretary Goddard and officers of Bethlehem on February 25, 1972, after five months of discussions. The order first states a finding by DER

> ". . . that emissions of air contaminants from the charging, coking and pushing operations of the by-product coke ovens at your coke works located in Bethlehem and Johnstown, Pennsylvania, are causing air pollution, as defined in the Air Pollution Control Act, the Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. §4001, et seq., in that the emissions are in violation of the standards established under Chapter 123 of the Rules and Regulations of the Department of Environmental Resources and because these emissions are inimical to public health, safety and welfare, and unreasonably interfere with the comfortable enjoyment of life and property."

The order then establishes a schedule for compliance and a final standard by which compliance will be measured. The schedule gave Bethlehem sixteen (16) months to develop a plan for the reduction of emissions from charging, coking and pushing operations which would be designed to achieve compliance with the final standard. The schedule further allowed Bethlehem four years for the implementation of the various phases of its control plan. Compliance with the final standard at each battery was not required until four years following the date the Department determined Bethlehem's plan was likely to achieve compliance and granted its official approval. The timetables were generous because it was understood that Bethlehem would have to search Europe and Japan for control technologies and might have to develop new technology.

B. Abatement plans providing for the control of emissions during charging, coking and pushing operations and schedules for the installation of control devices at each battery were timely submitted on June 29, 1973. DER approved the plans and installation schedules for the Johnstown plant on July 23, and for the Bethlehem plant on July 24, 1973. Upon approval, the plans and schedules became incorporated into, and enforceable pursuant to the terms of the order.

C. The approved plan for the Bethlehem (PA) batteries provides that pushing emissions would first be controlled on Battery No. 5 by installation of a coke-side shed or a moveable hood. The schedule provides for the submission of an application for approval to construct a pushing emission control device by March 1, 1975. On February 28, 1975, Bethlehem requested in writing an extension of time to allow Bethlehem to consider a device to control pushing emissions different than that already approved for Battery No. 5. The extension was denied by DER because the alternate device suggested by Bethlehem, a "fog-spray hood", was not demonstrated technology and was not based on sound principles of air pollution control engineering. Despite DER's denial of Bethlehem's last-minute request for extension, no application for the previously approved devices was submitted, nor has it been received to date.

D. The approved plan for the Franklin batteries (three of the five batteries at the Johnstown plant) provided that the batteries would be removed from operation entirely, according to a phased schedule. Operation of Battery No. 17 was to have been stopped first, on May 31, 1975. The approved phase-out schedule was apparently submitted at a time when Bethlehem was planning to reduce total iron production at Johnstown. On May 6, 1974, Bethlehem announced to the Governor that it no longer intended to reduce production at Johnstown. However, at no time between May, 1974, and May 15, 1975, did Bethlehem either submit an application to modify its abatement plan for the Franklin batteries, or make any proposal to control pushing emissions at Franklin.

E. In March, 1975, the Department denied Bethlehem's requested extension on the pushing schedule for Battery No. 5 at Bethlehem (PA) and advised that immediate commitments would have to be made to control emissions at the Franklin batteries in order to avoid enforcement of the approved shut-down plan. Bethlehem made no response to DER, but rather arranged a meeting with the Governor on April 17, 1975, at which proposals

were made to install a "fog-spray" device for the control of pushing emissions at two Bethlehem (PA) batteries (Nos. 2 and 5) and the three Franklin batteries (Nos. 17, 18, 19).

F. The Governor agreed to give Bethlehem until May 15, 1975, to submit detailed engineering proposals and an application to modify the approved plans, but stated that the consent order remained in effect. The applications were received and reviewed by DER in detail. The proposed modifications were rejected on many grounds by DER on June 16, 1975. The reasons for denial include, *inter alia,* Bethlehem's (1) failure to show that any circumstances had occurred which would justify modification of the abatement plans in accordance with the terms of paragraph 9 of the order, (2) the substitution of an untested experimental control device which Bethlehem could not demonstrate would achieve compliance with emission limitations in place of the previously approved control device which had been proven elsewhere, (3) failure to design the device to comply with DER regulations requiring the ability to measure emissions once the device is installed, and (4) failure to demonstrate that the device would not interfere with attainment of the national ambient air standards.

G. Concurrent with its denial of Bethlehem's applications to modify the abatement plans, DER by letter from Secretary Goddard to Bethlehem's Chairman Foy, requested Bethlehem to comply with its existing obligations:

> "As I indicated in my letter of May 27, the Commonwealth expected Bethlehem to comply in good faith with your existing legal duties which included the May 31, 1975 compliance deadline at Franklin battery No. 17. The Company's failure to comply casts some doubt upon its intentions. In view of the Department's rejection of your petitions to amend the air pollution abatement plan for the Bethlehem and Franklin batteries, you are requested to comply immediately with the obligations incorporated in the approved abatement plan. The Department will expect receipt of an application for plan approval which conforms to the approved plan for controlling pushing emissions at the Bethlehem battery No. 5 and compliance with the phase-out schedule at Franklin, *or in the alternative* acceptance of my offer in my letter of March 27, 1975, within ten days. Failure to comply with the Company's existing legal obligations will compel the Commonwealth to seek enforcement in the courts. (Letter, June 16, 1975, p. 2.)

Bethlehem replied by filing its appeal with the Environmental Hearing Board. Thereafter DER filed the *petition* seeking enforcement of those portions of the order with which Bethlehem has failed to comply. Bethlehem continues to this day to operate Battery No. 17 in Johnstown, and has made no effort to install any pushing control device at either Battery No. 5 or Battery No. 2 in Bethlehem.

H. Commonwealth Court denied Bethlehem's objections to jurisdiction on February 18 and Bethlehem filed an interlocutory appeal to the Pennsylvania Supreme Court on March 5, 1976.

I. During the course of the proceedings below, DER conducted ambient air sampling in the vicinity of

the Johnstown plant. As a result, it was found that the ambient air in areas down in from the plant contains highly elevated concentrations of known carcinogens. Based on this data, DER filed in the Commonwealth Court a motion for immediate temporary relief pursuant to Section 10(a) of the Air Pollution Control Act. In support thereof, DER alleged, *inter alia,* that the analysis of newly-gathered data with respect to concentrations of the carcinogen benzo(a) pyrene ("BaP") led to the conclusion that emissions from the Franklin coke oven batteries are causing a serious threat to the public health. This conclusion is supported by the sworn affidavit of a medical specialist in environmental health, Dr. Bertram W. Carnow, M.D. Commonwealth Court did not act on DER's motion, but rather issued a stay of all proceedings pending final disposition of Bethlehem's appeal.

J. DER moved the Pennsylvania Supreme Court for expedited handling of Bethlehem's appeal. The motion was granted. The Supreme Court issued its opinion and order within 63 days following argument. The Court affirmed the Commonwealth Court's dismissal of Bethlehem's preliminary objections holding that the Commonwealth Court had jurisdiction under the Pennsylvania Air Pollution Control Act to proceed to the merits on DER's petition for enforcement. The order of the Pennsylvania Supreme Court remanded the case to the Commonwealth Court for further proceedings.

K. Now, the stay in the Commonwealth Court has been continued pending this Court's disposition of Bethlehem's petition for certiorari. The national ambient air quality standards adopted pursuant to the Clean Air Act continue to be exceeded. The people of Johnstown re-

main without relief from a serious public health threat. DER believes that the situation is of considerable urgency and continues to deserve expedited handling by the Courts. Therefore, together with this reply to Bethlehem's petition, DER has also filed a motion for expedited disposition of Bethlehem's petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

I. Petitioner failed to explicitly set up or claim any title, right, privilege, or immunity under the constitution, treaties or statutes of the United States at any time during the proceedings in the state courts of Pennsylvania thereby precluding the invocation of this Court's jurisdiction pursuant to 28 U.S.C. §1257 (3).

This case presents no federal question. The entire proceeding to date arises out of Bethlehem's objections to jurisdiction by the Pennsylvania Commonwealth Court over DER's petition for enforcement of the duties contained in an administrative agency order consented to by Bethlehem. A true and correct copy of Bethlehem's preliminary objections is attached hereto as Appendix A. The only issues litigated to date have been limited to the theories asserted by Bethlehem as grounds for depriving the Commonwealth Court of jurisdiction over the proceeding. No federal constitutional question has ever been raised by Bethlehem at any point in the proceedings to date.

In its statement of the case at pp. 2-3 of its petition, Bethlehem admits that its objections in the state proceeding were limited to jurisdictional questions. Now, for the first time, Bethlehem claims that

> "*Inherent* and *implicit* in Bethlehem's preliminary objections is Bethlehem's contention that failure to dismiss the petition would violate Bethlehem's constitutional rights to due process of law." (Emphasis added.) Petition, at 3.

Examination of the opinion of the Supreme Court of Pennsylvania presented for review herein clearly reveals the non-federal character of the Petitioner's jurisdictional objections to the enforcement action presently pending on remand before the Commonwealth Court of Pennsylvania. These preliminary objections were founded solely on state theories of election of remedies, primary jurisdiction, and inapplicability of Section 10 (a) of Pennsylvania's Air Pollution Control Act.[1] Nowhere in the record nor in Bethlehem's application for reargument to the Pennsylvania Supreme Court does the belatedly asserted constitutional claim appear. Since no federal constitutional question was presented to any Pennsylvania Court at any time, this Court acquires no jurisdiction to review any alleged federal questions asserted now for the first time. *Whitney v. California,* 47 S.Ct. 641, 274 U.S. 357, 71 L.Ed. 1095 (1927); *Bolln v. Nebraska,* 20 S.Ct. 287, 176 U.S. 83, 44 L.Ed. 377 (1900); *Armstrong v. Treasurer of Athens County,* 41 U.S. 281, 10 L.Ed. 965 (1842); *Howard v. Fleming,* 24 S.Ct. 49, 191 U.S. 126, 48 L.Ed. 121 (1903); *Winona Land v. Minnesota,* 16 S.Ct. 88, 159 U.S. 540, 40 L.Ed. 252 (1895); *Hiawassee River Power Co. v. Carolina-Tennessee Power Co.,* 40 S.Ct. 330, 252 U.S. 341, 64 L.Ed. 601 (1920).

In *Bolln v. Nebraska,* supra, an objection that the defendant was denied due process of law in being refused a jury trial upon a plea in abatement was not raised un-

[1] Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4010(a).

til after the cause had been decided by the Supreme Court of Nebraska. Accordingly, this Court refused to consider the constitutional immunities not properly set up below nor appearing in the opinion presented for review by writ of error. The controlling principle was unequivocally articulated by the *Bolln* Court, supra, at 91:

> "We have repeatedly decided that an appeal to the jurisdiction of this Court must not be a mere afterthought, and that if any right, privilege, or immunity is asserted under the Constitution or laws of the United States it must be specifically set up and claimed before the final adjudication of the case in the court from which the appeal is sought to be maintained."

Similarly in *Hiawassee River Power Co. v. Carolina-Tennessee Power Co.*, 252 U.S. 341 (1920), a claim of invalidity under the state constitution was specifically urged and passed upon adversely to the petitioner in the state Supreme Court, but no reference was made in that connection to the Fourteenth Amendment to the Federal Constitution. Justice Brandeis aptly noted:

> "If a general statement that the ruling of the state court was against the Fourteenth Amendment were a sufficient claim of right under the Constitution to give this court jurisdiction [citation omitted], still the basis for a review by this court is wholly lacking here. For the Fourteenth Amendment was mentioned only in the trial court. In the Supreme Court of the state no mention was made of it in the assignment of errors; nor was it, so far as appears by the record, otherwise presented to or passed upon by that court. The denial of the claim was specifically set forth in the petition for the writ of error to this court and in the assignment of errors filed here, but obviously that was too late. Chicago, Indiana and Louisville Ry. Co. v. McGuire, 196 U.S. 128, 132." *Hiawassee River*, supra, at 344.

In view of this critical flaw in the alleged jurisdiction of the U.S. Supreme Court therein, the *Hiawassee* Court refused to make any further inquiry to the substance of the claim that petitioner had been deprived of due process.

This rule continues to be universally and strictly applied by the Court. Cf. *Monks v. New Jersey*, 90 S.Ct. 1563, 398 U.S. 71, 26 L.Ed. 2d 54 (1970); *Street v. New York*, 89 S.Ct. 1354, 394 U.S. 576, 22 L.Ed. 2d 572 (1969); *Pickering v. Board of Education of Township High School District 205, Will County, Ill.*, 88 S.Ct. 1731, 391 U.S. 563, 20 L.Ed. 2d 811 (1968).

Consistency with the prior constructions of the requirements of 12 U.S.C. §1257(3) mandates dismissal of the present writ for want of jurisdiction. Moreover, Petitioner's admission in its statement of the case (Petition, p. 3) that its constitutional contention was merely "*inherent* and *implicit* in Bethlehem's preliminary objections" would permit no other result under the sound principles of such precedents. The assertion of a federal claim before the highest court of the state must be made unmistakenly and cannot be left to mere inference. See *Winona Land Co. v. Minnesota*, supra (1895); *Bolln v. Nebraska*, supra (1900); and *Street v. New York*, supra (1969). Having failed to assert any federal claim below, Bethlehem has waived any opportunity it might otherwise have had to raise such a claim here.

II. Petitioner has failed to assert any claim which is within the scope of any right, privilege or immunity established by the Fourteenth Amendment of the United States Constitution.

Bethlehem contends that it has been denied due process protected by the Fourteenth Amendment on two grounds: (1) the procedure employed by the state shocks the sense of fair play, and (2) the procedure employed by the state impeded Bethlehem's open and equal access to the appellate courts. The record in this proceeding does not support either claim.

With respect to the first ground, Bethlehem claims that a sense of fair play must be shocked because DER subjected petitioner to an enforcement action which might be moot upon resolution of the pending proceedings to modify the order before the Pennsylvania Environmental Hearing Board. This contention suggests a very perverse sense of fair play, however, since it would require the public exposed to Bethlehem's carcinogens to suffer quietly while Bethlehem drags out endless litigation as a device by which it could avoid clean-up. The Pennsylvania Supreme Court was shocked by Bethlehem's sense of fair play, or the lack of any sense of fair play, and acted to protect the public health consistent with the mandates of the Legislature and Congress.

If the procedure employed by the Commonwealth in this case shocks the Court's sense of fair play, then numerous other analogous procedures should also shock the Court. For example, this case is no different than that of a party who is obliged to comply with a lower court's order while an appeal is pursued. Here the court of first

instance is DER.[2] Bethlehem presented an application to modify the order to DER. The application was carefully evaluated and rejected as being scientifically unsound and unlawful. Thereafter, Bethlehem appealed as was its right. In the meantime, however, it is being held to its earlier obligations. If such a procedure is shocking, then it should be equally shocking to require a party to comply with an injunction or decree of a court while an appeal is pending since the appeal might render the lower court decision moot. Clearly such procedures have never been considered shocking because as a rule it is assumed that courts, and agencies, act properly and within the law. Their judgments are commonly subject to enforcement unless stayed or overruled.

This case is no different. The decision of DER has been given deference by the Pennsylvania Supreme Court because the agency has the legal authority and the special experience necessary to act in the circumstances. The agency has exercised its authority responsibly and reasonably. Unless its decision is overturned in due course, it is not shocking for the courts to enforce the order which remains unchanged after DER's exercise of administrative discretion.[3]

To hold otherwise would be to hold that it is shocking whenever a court relies on the judgment of lawfully appointed agencies charged with special jurisdiction because of their expertise, and instead would require courts to defer enforcement of any duty so long as a polluter

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[2] See the Pennsylvania Supreme Court's discussion of primary jurisdiction at pp. 14a-15a of Bethlehem's petition.

[3] See Pennsylvania Supreme Court opinion, note 23, at p. 11a of Bethlehem's petition.

continued to have a claim pending which has not finally been disposed of in the appellate process. The latter rule would be truly shocking to those concerned about the public health impacts of dangerous uncontrolled air contaminants, such as the carcinogens emitted from coke ovens.

Certainly this Court cannot find the procedure in this case shocking since it follows closely the procedure contemplated by this Court in its discussion of variances in *Train v. Natural Resources Defense Counsel, Inc.*, 95 S.Ct. 1470, 421 U.S. 60, 43 L.Ed. 2d 731 (1975). There this Court clearly held that the standards in a State Implementation Plan (SIP) would remain enforceable during the pendency of any litigation by which a polluter pursued a variance under state law. This case is closely analogous in that a polluter is being required to comply with duties initially imposed as necessary for the attainment of national ambient air quality standards, while the polluter pursues appeals from the denial of plans which were rejected, in part, because they would interfere with the attainment of the national ambient air standards.

The Pennsylvania Supreme Court relied on the principle set out in *Train*, supra, and did not find it shocking to its sense of fair play.[4] Only someone shocked by the Congress' policy of swift attainment of ambient air quality standards would be shocked by the procedure followed in this case. We suggest that this Court should be shocked by Bethlehem's expectation that the Court might be shocked by the procedure employed in this case. We also

[4] See Pennsylvania Supreme Court opinion, text and note 24, p. 11a of Bethlehem's petition.

suggest that the Court should be shocked at Bethlehem's grotesque and perverse sense of fair play which gives no consideration to the rights of the public who are exposed to a significantly increased risk of premature death by cancer.

With respect to its second ground, Bethlehem claims that the procedure employed in this case has impeded Bethlehem's open and equal access to the appellate process. Such an argument is truly a fabrication which we cannot believe is made in good faith.

In both of the cases cited by Bethlehem in support of its contention, certain classes of persons were clearly discriminated against by statute with respect to their pursuit of appeals. *In Re Brown*, 439 F.2d 47 (3d Cir., 1971), involved discrimination against juveniles as compared to adults because juveniles could appeal only with leave of court whereas adults could appeal as of right. Such discrimination was held unconstitutional. In *Robinson v. Beto*, 426 F.2d 797 (5th Cir., 1970), convicted defendants could be incarcerated during the pendency of appeals without credit toward the sentence imposed. This rule was held to impede the open and equal access to appellate review because prisoners who appealed ran the risk of much longer imprisonments.

Here, Bethlehem is not discriminated against in any way. It is not part of a class deprived by statute from the same access to the courts enjoyed by others. Nor does the exercise of its right to appeal cause Bethlehem to incur any greater penalty. Bethlehem was assured the right to appeal from any adverse action by DER on its application for a modification to the order. Bethlehem has filed that appeal and has not been impeded in any respect in its pur-

suit. It might have been different if DER has refused to act on Bethlehem's application, but that is not the case here.

It should be noted in this regard that Bethlehem has twice requested continuances on its appeal to the Environmental Hearing Board, once in January, 1976 when the matter was scheduled for hearing, and again in August, 1976, when the continued hearing began. At no time since August has Bethlehem moved that the hearing be resumed. Bethlehem has been completely free and unfettered in pursuing its litigation strategy. No action of the state, and certainly not the Supreme Court opinion and order here at issue, has in any way impeded Bethlehem's pursuit of whatever relief may be available through the appeal route it has chosen.

With respect to both grounds for its claim, Bethlehem has not, nor can it on the face of this record, show that it has in any way suffered an infringement of the rights or immunities protected through the Fourteenth Amendment. Bethlehem cannot honestly contend that it falls within either rule cited in its petition. Certainly Bethlehem is not in a posture in any way similar to the claimants in the cases cited in its peititon. DER, therefore, contends that, since Bethlehem has failed to show any circumstances in this case whereby the procedures employed offend protected rights or immunities, then Bethlehem's petition should be dismissed for want of a substantial federal question.

CONCLUSION

Respondent, DER, contends that Bethlehem's petition for writ of certiorari should be denied because (1) no federal question was raised by Bethlehem at any time during the proceedings before the Pennsylvania Supreme Court or the Pennsylvania Commonwealth Court, and (2) Bethlehem raises no substantial federal question within the scope of the rights and immunities protected by the Fourteenth Amendment of the United States Constitution.

Respectfully submitted,

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APPENDIX A

COMMONWEALTH COURT OF PENNSYLVANIA

No. 1054 C.D. 1975

Commonwealth of Pennsylvania, Department of Environmental Resources,

Petitioner

v.

Bethlehem Steel Corporation, et al.,

Respondents

RESPONDENTS' PRELIMINARY OBJECTIONS TO THE DER'S PETITION FOR ENFORCEMENT OF AN ADMINISTRATIVE ORDER

Respondents Bethlehem Steel Corporation, Lewis W. Foy, its Chairman, and Thomas N. Crowley and Harold F. Miller, General Managers of its Johnstown and Bethlehem, Pennsylvania Plants, respectively,* file the following preliminary objections to the petition of the Commonwealth of Pennsylvania, Department of Environmental Resources (hereinafter the "DER"):

*The named respondents are referred to collectively hereinafter as "Bethlehem".

A. A motion to strike the individual respondents from this action because the DER's attempt to include them herein is not in conformity to law and constitutes scandalous and impertinent matter;

B. A petition raising a question of jurisdiction;

C. A demurrer;

D. Pendency of this very matter before the Environmental Hearing Board ("EHB")—"lis pendens";

E. That primary jurisdiction of this matter is in the EHB;

F. That the DER has failed to exhaust the administrative proceedings pending before the EHB;

G. That the DER's petition is not ripe for review in this Court because of the pendency of the matters involved herein before the EHB.

In support of these preliminary objections, Bethlehem represents as follows:

1. At the threshold, Bethlehem moves to strike the individual respondents, its Chairman and the General Managers of its Johnstown and Bethlehem Plants, from this action because the DER's attempt to include them herein is not in conformity to law and constitutes scandalous and impertinent matter. There is no authority whatsoever under the Air Pollution Control Act of this Commonwealth, under which the DER has filed this petition, which would justify the DER's attempt thus to harass and intimidate these persons. Accordingly, Bethlehem re-

spectfully submits that that portion of the DER's petition purporting to include them herein must be stricken under Rule 1017 (b) (2) of the Pennsylvania Rules of Civil Procedure.

2. With respect to the substantive allegations of the petition, the DER's original February 25, 1972 Air Pollution Abatement Order No. 72-533 which is the subject of this proceeding (Exhibit 1 to the DER's petition), as implemented by Bethlehem's DER-approved Air Pollution Abatement Plans of June 29, 1973 (Exhibits 2A and 2B to the Petition) contemplated, among other things, that Franklin Coke Oven Battery No. 17 at the Johnstown Plant would be taken out of operation by May 31, 1975 and that Bethlehem would submit an application for a permit to construct equipment to control pushing emissions at Coke Oven Battery No. 5 at the Bethlehem Plant by March 1, 1975. Order No. 72-533 expressly granted Bethlehem the right to apply to the DER for modification of the order and of the plans and schedules submitted and approved thereunder, in accordance with paragraph 9 thereof which provides as follows:

> "9. Upon application of Bethlehem Steel Corporation the provisions of this order, and plans and schedules submitted and approved hereunder, may be modified by the Department, when
>
> A. delivery or installation of equipment is delayed by events not in the control of Bethlehem Steel Corporation;
>
> B. revision of the plans and schedules submitted or approved is necessary to incorporate changes in technology or corporate planning to achieve with-

> in the time specified in paragraph 5 hereof, significant improvement in air pollution control; or
>
> C. air pollution control standards applicable to the by-product, slot-type coke ovens are changed. *Any order, decision or other action taken by the Department upon such application may be appealed to the Environmental Hearing Board and the courts of the Commonwealth as provided by law.*" (Emphasis supplied.)

3. Acting pursuant to paragraph 9 of Order No. 72-533, on September 17, 1973 Bethlehem submitted an application for amendment to the Air Pollution Abatement Plan applicable to Franklin Coke Oven Battery No. 17 at the Johnstown Plant. In that proposed amendment Bethlehem requested an enlargement of the time within which it would be required to terminate operation of that Battery. The DER did not take action on this request until February 18, 1975 when it denied the request by letter. Pursuant to the terms of paragraph 9 of Order No. 72-533, Bethlehem filed a timely appeal from that denial to the EHB at EHB Docket No. 75-070-D. The Franklin Coke Oven Battery aspect of that appeal has since been dismissed on stipulation of the parties, as more fully described in paragraph 6 hereof, but other aspects of that appeal are still pending before the EHB and the parties have been engaged in extensive discovery in that proceeding.

4. Bethlehem's original Air Pollution Abatement Plan of June 29, 1973 had contemplated the termination of integrated steelmaking operations at the Johnstown Plant and the consequent termination of the operation of the Franklin Coke Oven Batteries at that Plant. There-

after, however, Bethlehem pursued ongoing extensive corporate planning studies of its various production facilities, including those at its Johnstown Plant. As a result of such studies, Bethlehem adopted a change in corporate planning to replace the existing steelmaking facilities at its Johnstown Plant with a modern Basic Oxygen Furnace which necessitated the continued operation of the Franklin Coke Oven Batteries. Bethlehem announced that decision on May 6, 1974; shortly thereafter Bethlehem and the DER entered into negotiations contemplating the resolution of all outstanding air pollution control matters pending between them.

5. With respect to the Coke Oven Batteries at its plant in Bethlehem, Pennsylvania, Bethlehem's original Air Pollution Abatement Plan of June 29, 1973 provided, in part, that an application for a permit to construct equipment to control pushing emissions at Coke Oven Battery No. 5 would be submitted to the DER by March 1, 1975. In the light of the extensive and protracted negotiations referred to in paragraph 4 hereof, however, Bethlehem requested an enlargement of the time within which to submit that application. Although that request was ultimately denied in late February or early March 1975, the parties continued their efforts amicably to resolve all outstanding air pollution control matters.

6. After further negotiations in March and April 1975, by letter dated May 13, 1975 which was delivered to the DER on May 15, 1975, Bethlehem submitted to the DER proposed modifications of its original Air Pollution Abatement Plan for the Coke Oven Batteries at the Johnstown (Franklin) and Bethlehem Plants. In essence, these proposed modifications contemplated continued operation of the Coke Oven Batteries at both plants with proposed pollution control systems. Inasmuch as this proposed amendment superseded Bethlehem's September 17, 1973 request for enlargement of the time for continuing the operation of Franklin Coke Oven Battery No. 17, which had been denied by the DER, the parties stipulated to a dismissal of Bethlehem's appeal from that denial at EHB Docket No. 75-070-D insofar as that appeal affected the Abatement Plan for the Franklin Coke Oven Batteries. Significantly, the final paragraph of that Stipulation (paragraph 3) provides that:

> "3. The parties understand that the filing of this Stipulation and the entry of the Order requested herein shall not adversely affect the rights of the parties to make such decisions, take such actions or appeals, or file such motions as are authorized by law with respect to the proposed control plan amendments submitted to the Department on May 15, 1975."

On June 3, 1975 the EHB issued an order confirming the dismissal of that part of the appeal.

7. By letter dated June 16, 1975, the DER denied Bethlehem's requests for modification of the Abatement Plan for the Franklin and Bethlehem Coke Oven Batteries. On June 27, 1975, pursuant to paragraph 9 of Order No. 72-533, Bethlehem filed timely appeals from those denials to the EHB; the appeal concerning the proposed amendment to the Air Pollution Abatement Plan for the Bethlehem Plant is pending at EHB Docket No. 75-154-D and the appeal concerning the Johnstown Plant is pending at EHB Docket No. 75-155-D.

8. Notwithstanding the pendency of these proceedings before the EHB, and in defiance thereof and of the terms of its own order providing for initial review of any proposed modification of the Abatement Plan by appeal to the EHB, on or about July 25, 1975 the DER attempted to bypass administrative review by the EHB completely by filing the instant petition in this Court.

9. In the light of the foregoing undisputed history of these proceedings, Bethlehem respectfully submits that the DER is precluded from thus attempting to invoke the jurisdiction of this Court at this juncture of these proceedings. By the very terms of its own Order No. 72-533, the DER has acknowledged expressly Bethlehem's right to request modification of the original Abatement Plan and, upon the denial of that request by the DER, to appeal that denial "to the Environmental Hearing Board and the court of the Commonwealth" (paragraph 9 of Order No. 72-533). Pursuant to that unequivocal stipulation of the parties, Bethlehem has appealed the DER's denial of its May 15, 1975 requests to the EHB. Moreover, since the filing of these appeals the DER itself has initiated and is pursuing extensive discovery before the EHB in those proceedings. Thus, the DER is wholly foreclosed from invoking the jurisdiction of this Court by the very statute under which it purports to have filed this petition, which authorizes only the filing of a petition to enforce an order *"from which no timely appeal has been taken or which has been sustained on appeal"* (emphasis supplied). Section 10(a) of the Air Pollution Control Act, 35 P.S. §4010(a).

10. In these circumstances, the DER's petition must be dismissed under Rule 1017(b)(1) of the Pennsylvania Rules of Civil Procedure on jurisdictional grounds, under

Rule 1017(b)(4) because it is subject to demurrer, and under Rule 1017(b)(5) because of the pendency of these proceedings before the EHB. Further, whether the doctrines of primary jurisdiction, exhaustion of administrative proceedings and ripeness for review are considered to be preliminary objections raising questions of jurisdiction, pendency of a prior action, or both, it is obvious that they too compel the dismissal of the DER's petition—as a matter of law, this Court must first have the benefit of the EHB's decision in those proceedings before being requested to pass judgment thereon. Further, the issues which the DER attempts to raise in its petition to this Court may well be mooted by those proceedings. These considerations thus further compel the dismissal of the instant petition.

WHEREFORE, Bethlehem requests the Court to strike the individual respondents from this proceeding and to dismiss the DER's petition for enforcement without prejudice to the right of either the DER or Bethlehem to appeal from the EHB's adjudication in the proceedings pending at its Docket Nos. 75-154-D and 75-155-D.

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(s) PAUL A. MANION
Counsel for Respondents

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Pittsburgh, Pa. 15219
(A.C. 412—288-3236)
Date: September 19, 1975

AFFIDAVIT

Commonwealth of Pennsylvania,
County of Lehigh, ss:

David M. Anderson, being duly sworn according to law, deposes and says that he is Manager, Environmental Quality Control Division, Industrial Relations Department of Bethlehem Steel Corporation; that he is authorized to execute this affidavit on behalf of the respondents in the foregoing action; and that the averments of fact set forth in the foregoing preliminary objections are true and correct, in part upon the basis of his personal knowledge, in part upon the basis of facts alleged in the DER's own Petition for Enforcement of Administrative Order and the exhibits attached thereto, in part upon the basis of the business records of Bethlehem Steel Corporation, and in part upon the basis of information which he believes to be true.

(s) David M. Anderson

SWORN TO AND SUBSCRIBED before me this 17th day of September, 1975.

(s) [Illegible]
Notary Public

My Commisison Expires: July 17, 1978

City of Bethlehem
Lehigh County